

## 60 CONCURRENT REPRESENTATION AND UNFAIR LABOR PRACTICE CASES:

- 60.1 General Policy and Procedures:** Absent the filing of a request to proceed, an election is not held when an unfair labor practice charge is filed by a party to the representation case and is based on conduct which has a tendency to interfere with the free choice of the employees in the election.
- 60.2 Priority of blocking unfair labor practice charges:** Because the speedy resolution of representation questions is of the utmost importance, an unfair labor practice charge that blocks a representation election petition is given the highest priority by Regional Offices both in the investigatory and, where necessary, the litigation phases of a case. In the latter situation, regions request expeditious trial dates from the Office of Administrative Law Judges. Moreover, in meritorious cases, every effort is made to obtain an early settlement of the issues.
- 60.3 Closure of the unfair labor practice charge unblocks the representation case:** Disposition of a charge does not serve to “unblock” the representation proceeding until the appeal period expires and no appeal is filed, or after an appeal is filed, and the General Counsel decides the appeal. If the case is remanded, the representation case continues to be blocked. If the appeal is denied, the unfair labor practice case is closed and the representation case is unblocked and processed.

***NOTE: The Deputy General Counsel and the Assistant General Counsel for Appeals are notified of a pending representation case that is blocked because of an appeal of an unfair labor practice charge. In such case, the Office of Appeals expedites processing the appeal. While the appeal is pending the region has discretion to take preliminary steps in processing the representation case, short of dispositive action.***

- 60.4 Conducting elections:** Where unfair labor practice charges are filed too late to permit an adequate investigation before a scheduled election, the Regional Director: 1) conducts the election, 2) issues a tally of ballots, 3) investigates any determinative challenged ballots or objections, and 4) contacts the Office of the General Counsel prior to taking action on the determinative challenged ballots or objections or issuing an appropriate certification. The region investigates the charges after tallying the ballots.

**60.5 Situations where an unfair labor practice charge does not block the representation proceeding:**

There may be some situations where resolution of the unfair labor practice may be resolved by processing the representation petition first. In such cases, the Regional Director has discretion to decide which case to block and which case to process. For example,

**60.5.1** Unit eligibility: There may be situations where the alleged unfair labor practice is so related to an unresolved representation matter that the processing of the representation case will resolve significant common issues. For example, a pending unfair labor practice case having a threshold issue of unit eligibility may be deferred pending resolution of a petition that seeks to clarify the unit status of the individual employee(s) who are the subject of the unfair labor practice charge. By deferring the unfair labor practice charge, the region provides for retention of jurisdiction over the charge while resolving the question concerning the employee(s)' s bargaining unit status through the appropriate representation proceedings. [Figure 60](#) is a sample of a deferral letter used in these cases.

**60.5.2** Refusal to negotiate after a reorganization when representation of employees is unclear.

**60.5.3** Requests to proceed: When the parties in a representation proceeding submit a [FLRA Form 44](#), Request to Proceed, the region has discretion to defer the unfair labor practice charge pending resolution of the representation proceeding.

**60.6 Processing representation issues in unfair labor practice charges:**

- a. Although all representation issues are best resolved by the filing of a representation petition, certain representation issues may arise in an unfair labor practice charge. Examples include questions related to unit eligibility (an employee is denied dues checkoff because the agency states s/he is excluded from the unit) and successorship (refusal to negotiate following a reorganization where the union claims it continues to represent employees affected by the reorganization). In these examples, resolving the representation issue is a preliminary consideration necessary to determine the outcome of the ULP proceeding.
- b. A unit certification may not be altered in an unfair labor practice proceeding. See *Department of Health and Human Services, Washington, D.C.*, 16 FLRA 586, 590 (1983); *Internal Revenue*

*Service, Seattle District, et. al.*, 12 FLRA 324 (1983); *North Carolina Air National Guard, Charlotte, North Carolina*, 4 FLRA 348 (1980); *The Adjutant General - Georgia, Georgia National Guard, Department of Defense, Atlanta, Georgia*, 2 FLRA 712 (1980); *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado* and *International Brotherhood of Electrical Workers, AFL-CIO, Locals 640, 1245, 1759, 1959 and 2159*, Case No. 7-CA-1229, OALJ-82-119 (1982).

- c. Regional Offices encourage and solicit representation petitions whenever they receive an unfair labor practice charge that raises a representation issue. If a representation petition is filed, the region defers the unfair labor practice case while the representation proceeding is pending. Section 2422.34(a) applies whenever a petition is filed and guides the parties' conduct during the pendency of the petition except when the petition concerns a simple straight forward eligibility issue. See § 2422.34(b). ([CHM 62](#)).
- d. Resolving the representation issue, however, does not necessarily resolve the unfair labor practice. Once the representation issue is decided and resolved, the region re-evaluates the merits of the unfair labor practice charge.

